

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
Tampa Division**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN, et al.

Defendants.

**SAMI AMIN AL-ARIAN'S APPEAL FROM MAGISTRATE'S RULING REGARDING  
MOTION TO DISMISS PRE INDICTMENT DELAY**

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by counsel, and moves this Honorable Court to note his appeal from the Magistrates ruling regarding the Accused Motion to Dismiss for Pre Indictment Delay.

As grounds for the aforesaid, the Accused avers that the Magistrate's finding rest almost entirely on the Magistrate's belief that no prejudice has occurred with respect to the Accused as a result of the delay here. While acknowledging that there has been a delay of anywhere between ten and twenty-one years, depending on the charge against the Accused, the Magistrate treats such a delay as if it were merely a matter for months. Surely, there must be serious prejudice that naturally accompanies a delay of ten years or more. It is impossible for an Accused to remember where he was, who he met, and the context of the thousands of conversations he had twenty years later. This state of affairs is not particular to this Accused, any human who is compelled to look back over a twenty-year period of his or her life would find it difficult.

In this case, the above-mentioned facts are exacerbated by the conduct of the government. A review of the indictment shows that the vast majority of the overt acts concerning Dr. Al-Arian are covered in the years 1994 through 1995, some ten or eleven years ago. In 1995, Dr. Al-Arian's home and office were searched. Later that very same year a

substantial portion of that which was seized from his home and office was returned to Dr. Al-Arian. How was this return of seized property to be interpreted by Dr. Al-Arian when he was not charged until nine years later? The government's action in charging Dr. Al-Arian nine years later certainly did not put him on notice that he should be vigilant in the maintaining either his thoughts or property which were the product events occurring some nine years prior. The Magistrate's ruling makes much of the fact that the government has constructed an indictment, which is within the statute of limitations. The government can always structure an indictment within the statute of limitations, and as a practical matter, it would always do so to avoid the obvious consequences. In the case of the initial indictment as well as the superceding indictment many of what the government contends are overt acts are not acts, nor do they seem to be in furtherance of anything. It has been noted in the context of a grand jury that the government can indict a ham sandwich. Is there any doubt that the government can be equally creative in regards to overt acts so as to place the conspiracy counts within the confines of statute of limitations?

### **Destruction of Evidence**

In the instant case, the government agrees that some evidence has been destroyed. The faxes that were purportedly maintained on a reel-to-reel tape recordings. It seems obvious that at the time of the interception of these faxes the government was interested and concerned about the information contained in the faxes. As such, there is little doubt that these transmissions were translated and reviewed. As a result, the defense believes that not only are the electronic signals maintained undecipherable, but the government's translations, which were done nearly contemporaneously with the receipt of faxes, were intentionally destroyed. This view is consistent with the notion that at the time of the initial acquisition of the faxes the investigation

in this case was a counter-intelligence investigation. Therefore, it was never intended that they be utilized in a criminal trial. Further, because of that very fact the government assumed no duty to maintain exculpatory materials with respect to the faxes. The government has offered no good explanation for the destruction of these items and they are in the critical time period with respect to Dr. Al-Arian.

### **Mazen Al-Najjar**

Mazen Al-Najjar has been deported. No defendant played a role in the decision to deport Al-Najjar. Charged or not Al-Najjar is a witness to many events charged in the indictment. The government does not deny that they were considering the indictment of Sami Al-Arian at the same time they were undertaking the deportation of Al-Najjar. Nor does the government deny that it was likely that it knew Al-Najjar possessed information that would be relevant and material to the defense of this matter. Yet the government made Al-Najjar unavailable; by deporting him. The manipulation of Al-Najjar did not stop there. The government has offered no explanation for the change in Al-Najjar's status from unindicted co-conspirator to indicted co-conspirator. The sole purpose for this fact was to defend against the contention that the government was utilizing a grand jury to investigate a currently pending indictment. With respect to the prejudice issue, the prejudice should be clear. As a result of the forcible removal of Al-Najjar, the government can rely solely on the activities of Al-Najjar to convict these defendants of a life count. All this without Al-Najjar being able or required to defend and the defense having no ability to produce him. Can there be any greater degree of prejudice where as here the person at issue has been made unavailable by the government?

There should be no definitive ruling on this motion until discovery is complete. All the prejudice that resulted from this delay cannot possibly be discerned until discovery is complete,

including the receipt of exculpatory evidence and the Jencks material. Everyday counsels' day is interrupted by a new disclosure of more discovery. Proper analysis of all the prejudice in this matter must await the completion of this process.

Here the Magistrate completely ignores the prejudice that naturally results from a ten to twenty year delay in his assessment of prejudice, calling upon the Accused to detail prejudice where just remembering the events of twenty years ago is a draconian task.

Further, the Magistrate completely ignores the conduct of the government with regard to both the actual destruction of evidence and the manipulation of a defendant/witness.

Dated: 31 January 2005

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31<sup>st</sup> of January, 2005, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ William B. Moffitt  
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